SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1751

Ringsby Truck Lines, Inc., et al.
Petitioners,

v.

The National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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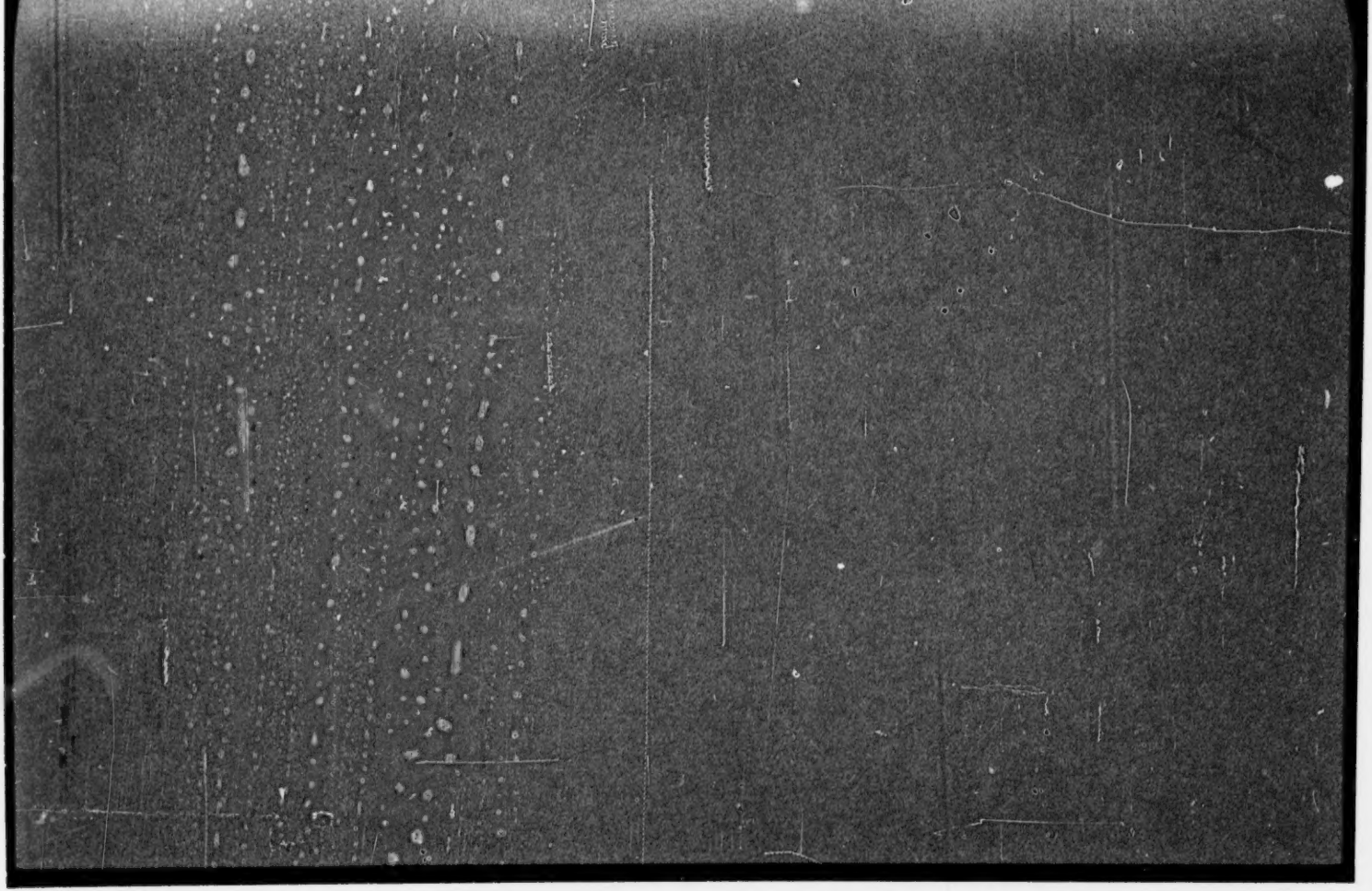

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ———

RINGSBY TRUCK LINES, INC., ET AL.
Petitioners,

v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pages 1a to 11a. The opinion of the three-judge United States District Court for the District of Colorado, as yet unreported, appears at Appendix B, *infra*, pages 12a to 17a. The report and

order of the Interstate Commerce Commission which the District Court reviewed, *Increased Class and Commodity Rates, Transcontinental*, 329 I.C.C. 420 (1967), appears at Appendix C, *infra*, pages 18a to 29a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1973. A petition for rehearing was denied on February 21, 1974. This Court has jurisdiction to review the judgment under Section 2154(1) of Title 28 of the United States Code, which provides that cases in the courts of appeals may be reviewed by this Court by "writ of certiorari granted upon the petition of any party."

QUESTION PRESENTED

Is the statutory provision excepting from the jurisdiction of courts of appeals judgments of three-judge district courts setting aside orders of the Interstate Commerce Commission rendered inapplicable on the premise that the jurisdiction of a three-judge court properly convened to entertain a suit to set aside such an order is defeated by a subsequent change in circumstances?

STATUTES INVOLVED

28 U.S.C. § 2321:

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

28 U.S.C. § 2325:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 1253:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On August 1, 1964 the Interstate Commerce Commission permitted Petitioners here, together with some 1,400 other motor common carriers, to effect a general increase of 3 percent in their Transcontinental rates. At the same time, it instituted a formal proceeding on the lawfulness of the increase under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g). On April 15, 1966 the Commission issued its decision in that proceeding, reported in *Increased Class and Commodity Rates, Transcontinental*, 326 I.C.C. 397 (1966). Revers-

ing the initial decision of its hearing examiner, the Commission found the increase "not shown to be just and reasonable" and ordered it cancelled. By subsequent order it fixed September 12, 1966 as the date for cancellation.

The carriers brought suit to set aside the Commission's order in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1336(a) and 49 U.S.C. § 17(9). A three-judge court was convened as required by 28 U.S.C. § 2325. On January 5, 1967 the Court vacated the order, which it had restrained *pendente lite*, and remanded the case to the Commission for further proceedings. *Ringsby Truck Lines, Inc., et al.* v. *United States, et al.*, 263 F. Supp. 552 (D. Colo. 1967). On February 1, 1967 the Commission responded to the remand by issuing a new decision. It again found the increase in rates "not shown to be just and reasonable" and again ordered it cancelled by a date certain. However, it stayed the order of cancellation pending judicial review if review were sought.

On February 27, 1967, the carriers again brought suit to set aside the Commission's order in the United States District Court for the District of Colorado. A three-judge court was again convened as required by 28 U.S.C. § 2325. On September 4, 1968 The National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Conference, Inc. (Shippers hereinafter) were permitted to intervene in the suit and file a counterclaim for the restitution of monies collected by the carriers under the increase the Commission had ordered cancelled. In the meantime, on August 29, 1967 the carriers superseded the increase at issue by a greater increase which in turn was superseded by several successive increases. Although protests were filed against the increase of Au-

gust 29, 1967 the Commission, in the exercise of its discretion, refused to suspend or investigate it.[1]

On March 2, 1972, the three-judge District Court vacated and set aside the Commission's order of February 1, 1967 and remanded the case to it "for such further proceedings as may be appropriate." Neither the Commission nor the United States took an appeal from that judgment. However, Shippers filed an appeal to this Court, as well as to the United States Court of Appeals for the Tenth Circuit. On October 24, 1972 this Court dismissed the appeal "for want of jurisdiction." *National Small Shipments Traffic Conference, et al.* v. *Ringsby Truck Lines, et al.*, 409 U.S. 943. The Court of Appeals then proceeded to hear the appeal to it. On December 13, 1973 it rendered its decision. It first held that it had jurisdiction of the appeal because the case should have been heard by a one-judge rather than a three-judge district court. It then vacated the judgment setting aside the Commission's order and remanded the case to the District Court with instructions that a single judge entertain Shippers' counterclaim. A writ of certiorari is sought to review the holding of the Court of Appeals that it had jurisdiction to entertain Shippers' appeal.

REASONS FOR ISSUANCE OF THE WRIT

There are indeed what Rule 19(1) of this Court describes as "special and important reasons" for the issuance of a writ of certiorari in this case. The decision of the Court of Appeals for the Tenth Circuit is in conflict, not with a decision of another court of appeals, but with two decisions of three-judge district courts in

[1] The Commission's refusal to suspend or investigate that increase was held to be a lawful exercise of its discretion. *National Industrial Traffic League* v. *U. S. and I.C.C.*, 287 F. Supp. 129 (D. D.C. 1968), aff'd *per curiam*, 393 U.S. 535 (1969).

the Tenth Circuit.[2] Such district courts are of course of equal rank with courts of appeals in the federal judicial system. "[A]s the District Court is thus constituted of at least three judges who might constitute a Circuit Court of Appeals, it is to be ranked with that court in the weight to be given its conclusions." William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L. J. 1, 5-6 (1925).

Furthermore, the Court of Appeals "decide[d] a federal question in a way in conflict with applicable decisions of this Court." The federal question so decided is a most important one because it goes to the distribution of jurisdiction among the courts of the United States. Section 2 of Article III of the Constitution gives the Congress the power to regulate the appellate jurisdiction of this Court and to create inferior courts and to fix their jurisdiction, and the Congress has exercised that power with great care and particularity. Nothing is more fundamental to the orderly and efficient exercise of the federal judicial power than that the federal courts observe the distribution of jurisdiction among them that the Congress has prescribed. Thus, it is settled law that lack of jurisdiction over the subject matter of a particular action in a particular federal court cannot be waived, and that federal courts must determine their jurisdiction *vel non* whether or not the parties put it in issue. It is for this reason that they require persons seeking to invoke their jurisdiction to state the grounds upon which it depends. See Rules 10 and 23 of this Court; Rule 8(a) of the Rules of Civil Procedure for the United States District Courts.

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[2] *Admiral Merchants Motor Freight, Inc.* v. *U.S.*, 321 F. Supp. 353 (D. Colo., 1971) aff'd. *per curiam*. 404 U.S. 802, and the decision of the three-judge district court in this case.

The Court of Appeals, in an opinion by Chief Judge Lewis, grounded its holding that it had jurisdiction as follows: Between the time the three-judge District Court was convened and the time the case was heard the increase that the Commission had ordered cancelled had been superseded by further increases. Hence, there was no need for an injunction against the Commission and a "determination of the validity of the ICC order was of practical import only as it related to [Shippers' counterclaim for restitution]. The ICC order thus became essentially one for the payment of money and was properly reviewable by a one-judge rather than a three-judge district court." Appendix A, page 7a.

The holding of the Court of Appeals of course conflicts with the holding of the three-judge District Court from whose judgment it erroneously entertained an appeal.[3] It also squarely conflicts with *Admiral Merchants Motor Freight, Inc.* v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971), aff'd *per curiam*, 404 U.S. 802. In that case, as in the case at bar, the Commission found an increase in the rates of motor common carriers not shown to be just and reasonable and ordered it cancelled by a date certain. In addition, its order there, unlike its order here, provided as follows:

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[3] No party challenged the jurisdiction of the three-judge court while the case was before it. Counsel for the Government was asked from the Bench what the Court could do in view of the passage of years and further increases in rates. He answered: "The Court can sustain the Commission's decision and dismiss the Complaint and refer the matter of restitution to a single judge court. That's what the Court can do." Counsel for shippers answered the Court's inquiry as follows: "They have come to you and they have said, 'cancel an order of an administrative agency of the United States.' Now there are some legal consequences that flow from that, but they have no right to ask a federal district court to do that until they ask it of three judges, and we in turn have asked this Court, the Federal District Court of Colorado, for relief on our counterclaim."

> "[T]he [carriers] be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable." 321 F. Supp. at 356.

The carriers brought suit to set aside *only* the quoted portion of the Commission's order. The United States and the Commission challenged the jurisdiction of a three-judge court to review an order that did no more than require carriers to pay money to shippers. The Court, in an opinion subscribed to by Chief Judge Lewis, the author of the opinion in the case at bar, held that the suit was "not to be classified as an action to enforce the payment of money" within the meaning of 28 U.S.C. § 2321 and that it was therefore "duty bound to entertain the suit and to determine it on its merits." 321 F. Supp. at 357. On the merits the Court held that annulment of the Commission's order was not justified and entered judgment dismissing the carriers' complaint.

On direct appeal to this Court by the carriers, the United States and the Commission moved for dismissal on the ground that the Commission's order was one for the payment of money and therefore not reviewable by a three-judge court and not reviewable by this Court on appeal. This Court affirmed the judgment *per curiam*, 404 U.S. 802 (1971), and denied a petition for rehearing of that affirmance. 404 U.S. 987 (1971). This Court is well aware of the distinction between a holding that a federal court lacks jurisdiction to entertain a claim and a holding that a claim has no merit. In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), it was at pains to make the distinction and correct the judgment it affirmed from one of dismissal for want of jurisdiction to one of dismissal for failure to establish a cause of action. Hence, this Court's affirmance in *Admiral Merchants* was necessarily

a denial of the motion to dismiss the appeal for want of jurisdiction and the exercise of jurisdiction to review the merits of the judgment of the three-judge court.

Referring to the fact that this Court dismissed Shippers' direct appeal from the judgment of the District Court in the case at bar for "want of jurisdiction", the Court of Appeals said:

> "In the absence of an articulated reason for this dismissal, we will not presume to engage in a meaningless exercise of reading that Court's mind. It is sufficient to note for our purposes that the appeal could have been dismissed because the Court felt that the three-judge court below was not required." (Appendix A, p. 7a).

In the light of this Court's affirmance of the judgment in *Admiral Merchants* the Court of Appeals was clearly wrong. Whatever the reason for this Court's conclusion that it lacked jurisdiction of Shippers' appeal in the case at bar, it was not because the Commission's order directing the cancellation of an increase in rates was reviewable by a single-judge District Court.

Other reasons for this Court's conclusion that it lacked jurisdiction of Shippers' appeal suggest themselves.[4] Since the increase to which the Commission's order was addressed had been superseded by further increases, there was no need to determine, and the District Court did not determine, whether the order requiring the increase to be cancelled was valid or invalid. *Mechling Barge Lines, Inc.* v. *U. S.*, 368 U.S. 324 (1961).[5] Hence, there

[4] The carriers, as well as the United States and the Commission, moved to dismiss Shippers' appeal. The carriers urged several grounds, but not that the case was one for a single judge.

[5] In these circumstances, the vacation of the Commission's order by the District Court was the appropriate disposition of the case. *United States* v. *Munsingwear*, 340 U.S. 36 (1950). As this Court said in *Mechling*, that disposition assures that the parties are not

was no "case or controversy" between the carriers and the Commission within the appellate jurisdiction of this Court. *De Funis* v. *Odegaard*, 42 L. Wk. 4578 (April 23, 1974). Shippers' complaint for restitution is of course a separate and distinct "case or controversy" between them and the carriers.[6] That "case or controversy" is not one for a three-judge court, *Public Service Commission* v. *Brashear Freight Lines*, 312 U.S. 621 (1941), and was not entertained by the District Court. Hence, it was not within the appellate jurisdiction of this Court.

The Court of Appeals recognized that the Commission's order in the case at bar was reviewable only by a three-judge district court at the time suit to review it was brought. Its rationale was that the subsequent action of the carriers and the Commission superseding the increase made injunctive relief unnecessary and rendered the order "essentially one for the payment of money" and defeated the jurisdiction of the three-judge court. We submit that this proposition is untenable.

In the first place, the settled rule is that the jurisdiction of a federal court is determined by the situation existing at the time suit is begun. Once jurisdiction has attached it is not defeated by a subsequent change

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"concluded in subsequent litigation" by an order of the Commission that has not been finally determined to be valid or invalid. 368 U.S. at 329. Shippers are free to attack, and carriers free to defend, the lawfulness of the charges paid in a proceeding before the Commission ancillary to a suit for reparations authorized by Section 204a of the Interstate Commerce Act, 49 U.S.C. 304a.

[6] Assuming *arguendo*, the validity of the Commission's order, it does not follow that shippers are entitled to restitution. "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309 (1935). Shippers must therefore establish that the carriers cannot in good conscience keep the charges paid them.

in circumstances. Thus, whether the amount in controversy is sufficient for jurisdiction under 28 U.S.C. §§ 1331 and 1332 is determined by the amount claimed by the plaintiff in good faith. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 282 (1938). Whether there is diversity of citizenship is determined from the pleadings, *Smith* v. *Sperling*, 354 U.S. 91 (1957), and a subsequent change in the citizenship of one of the parties does not defeat diversity jurisdiction. *Brough* v. *Strathmann Supply Co., Inc.*, 358 F. 2d 374 (3rd Cir. 1966). Once a three-judge district court has been convened a plaintiff will not be permitted to amend his pleadings by withdrawing the Constitutional question that gives the court jurisdiction. *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825 (N.D. Tex. 1938), aff'd *per curiam*, 308 U.S. 512.

In the second place, whether an order of the Commission is reviewable in a three-judge district court depends, not upon the terms of the order, but rather upon the nature of the proceeding in which the order is issued. Thus, in *Admiral Merchants, supra*, as in the case at bar, the Commission's order was issued in a proceeding under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), to determine whether an increase in rates was just and reasonable. The Commission issued an order directing the carriers to cancel the increase and refund the monies that had been collected thereunder. The three-judge district court held that the carriers' suit to review the requirement that they make refund was "not to be classified as an action for the payment of money" within the meaning of 28 U.S.C. § 2321. 321 F. Supp. at 357. This is the teaching of this Court's decisions.

I.C.C. v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966), held that a railroad can secure judicial review of an order of the Commission awarding damages to a

shipper only in the court where the shipper brings suit to enforce it. In so holding this Court was at pains to emphasize that if an order goes beyond an award of reparations, e.g., directs a carrier to establish a particular rate or to cease and desist from charging a particular rate, it is reviewable only by way of suit in a three-judge court. In other words this Court made clear that the only orders that may be reviewed by a single-judge district court are orders entered by the Commission in proceedings in which the sole issue is whether or not a carrier should be required to pay money for alleged past transgressions of the Interstate Commerce Act.

In *United States* v. *I.C.C.*, 337 U.S. 426 (1949), the Government, as a shipper, filed a complaint for damages with the Commission under Section 9 of the Interstate Commerce Act, grounded on the allegation that the railroads had collected unreasonable charges upon specific past shipments. This Court held that the Commission's order denying damages was judicially reviewable in a one-judge district court. Its rationale was that, while the Government was not seeking to enforce an order for the payment of money, "the root of the controversy concerns the payment of money damages under [Section 9]." Since suit to enforce an order awarding damages would be reviewed by a one-judge court, such a court "would appear to be an equally appropriate and adequate tribunal" for reviewing an order denying damages. 337 U.S. at 443.

The Court of Appeals here relied on *Pennsylvania Railroad Co.* v. *U. S.*, 363 U.S. 202 (1960). The reliance is misplaced. In that case the United States had refused to pay a railroad the freight charges on 75 shipments on the ground that the rates on which the charges were based were unreasonable. The railroad brought suit in the Court of Claims to recover the charges. The

Court of Claims stayed proceedings to enable the Commission to determine the reasonableness of the rates. After hearing, the Commission found that the rates were unjust and unreasonable as to 62 shipments and just and reasonable as to 13. The railroad brought suit in a United States District Court to review the order. The Court of Claims refused to stay proceedings on the ground that the order was not reviewable and entered judgment on the basis of the order. This Court reversed. It held the Commission's order reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9). The Court then went on to say that the order was reviewable by a one-judge rather than a three-judge court because it was "essentially one 'for the payment of money' within the terms of 28 U.S.C. §§ 2321 and 2325," citing as authority *U. S.* v. *I.C.C.*, *supra.*

In *Pennsylvania*, as in *U. S.* v. *I.C.C.* and *Atlantic Coast Line*, the only issue in the proceeding before the Commission was whether a shipper was entitled to reparations. It is distinguishable from those cases only in that the proceeding was instituted upon a referral by the Court of Claims rather than upon the filing of a complaint for damages. This is a distinction without a difference. Hence, *Pennsylvania* is not authority for the proposition that, as the Court of Appeals held, an order directing carriers to cancel an increase in rates and therefore properly reviewable only in a three-judge court is converted by supervening events into "one for the payment of money."

The Court of Appeals noted that whether it had jurisdiction depended upon whether the "dispositive issue require[d] the consideration of a three-judge court." The dispositive issue, indeed the only issue, was the validity *vel non* of the finding by the Commission that an increase in rates had not been shown to be just and reasonable and the order requiring the increase to be can-

celled. It is true, as the Court said, that the "necessity for injunctive relief against [enforcement of the] order was obviated" by supervening events. But there was a necessity for the Court to determine whether or not, in the words of 28 U.S.C. § 2321, to "annul or set aside in whole or in part [an] order of the Interstate Commerce Commission other than for the payment of money . . . ."

PRAYER

For all of the foregoing reasons Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit and, upon review of the record in that Court, reverse its judgment and remand the case to it with directions to dismiss the appeal to it for want of jurisdiction.

Respectfully

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May 22, 1974

CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., one of counsel for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 22nd day of May, 1974, I mailed copies of the foregoing document, first class postage prepaid, to the following:

Honorable William B. Saxbe, Attorney General, Department of Justice, Washington, D. C. 20530, Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable James L. Treece, United States Attorney, 323 United States Court House, Denver, Colorado 80202.

Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

William Q. Keenan, Esq., 277 Park Avenue, New York, New York, 10017 and James L. Tilly, Esq., 830 Capital Life Center, Denver, Colorado 80202.

BRYCE REA, JR.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
November Term, 1973

No. 72-1887

RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, INC., NAVAJO FREIGHTLINES, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., DC INTERNATIONAL, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, GARRETT FREIGHTLINES, INC., IML FREIGHT INC., LEE WAY MOTOR FREIGHT, INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E. FREIGHT, INC., TRANSCON LINES, UNITED-BUCKINGHAM FREIGHT LINES, WATSON-WILSON TRANSPORTATION SYSTEM, INC., and WESTERN GILLETTE, INC.,

Appellees,
(Plaintiffs below)

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
(Defendants below)

v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants.
(Intervening Defendants below)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(67-C-97)

Decided December 13, 1973

William Q. Keenan, New York, New York (James L. Tilly, Denver, Colorado, and of counsel, Arsham & Keenan, New York, New York, and Tilly & Graves, Denver, Colorado, with him on the brief) for Appellants.

Alvin J. Meiklejohn, Jr., Denver, Colorado (David E. Driggers, of Jones, Meiklejohn, Kehl & Lyons, Denver, Colorado and Z. L. Pearson, Jr., William E. Kenworthy and Gerald W. Hess, Denver, Colorado, were with him on the brief) for Appellees.

Before LEWIS, Chief Judge; BARRETT and DOYLE, Circuit Judges.

LEWIS, Chief Judge.

This appeal is brought by the National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, intervening defendants below, from the judgment of a statutory three-judge court convened in the United States District Court for the District of Colorado. The court vacated and set aside an Interstate Commerce Commission rate cancellation order and remanded the matter to the Commissioin for further proceedings.

A full understanding of the issues presented here requires a detailed accounting of the complex procedural

history antedating this appeal. By schedules which became effective on August 1, 1964, appellees-motor carriers established a general three percent increase in their transcontinental rates and charges. In response to a filed protest the Interstate Commerce Commission instituted an investigation into the lawfulness of this increase but decided, pending the outcome of its investigation, not to suspend the operation of the increase but rather to permit it to become effective. The ICC ultimately concluded, however, that the increase had not been shown to be just and reasonable and on April 15, 1966 it ordered that the rate increase be canceled before June 1966. Increased Class and Commodity Rates, Transcontinental, 326 I.C.C. 397. A petition for reconsideration was denied but the original cancellation order was modified so as not to become effective until September 12, 1966.

The motor carriers instituted an action in the United States District Court for the District of Colorado, seeking to set aside, annul and enjoin the rate cancellation order. The United States was joined with the ICC as a mandatory defendant under 28 U.S.C. §§ 2321-22. Appellants-shippers were permitted to intervene in this action. On September 9, 1966 a temporary restraining order was entered preventing the ICC from canceling the rate increase and on November 4, 1966 the court directed that this order remain in effect until a final judicial determination was made.

A three-judge district court was convened pursuant to 28 U.S.C. §§ 1336, 2325, and 2284. On January 5, 1967 the court vacated the rate cancellation order and remanded the matter to the ICC for further proceedings. Ringsby Truck Lines, Inc. v. United States, D.C. Colo., 263 F. Supp. 552. The court concluded that the findings and reasoning of the ICC were insufficient to support its holding and that a remand was necessary to afford the ICC an opportunity to articulate the basis of its holding.

The shippers appealed to the United States Supreme Court under 28 U.S.C. § 1253, contending that any restitutionary claim for excessive rates charged would be destroyed if the judgment of the district court were permitted to stand. On February 1, 1967, less than one month after the initial remand, the ICC affirmed its previous decision canceling the rate increase. Increased Class and Commodity Rates, Transcontinental, 329 I.C.C. 420. It articulated as the basis of its decision the failure of the motor carriers to sustain their burden of proof of establishing that the rate increase was just and reasonable with the type of evidence which they had been given notice to provide. The ICC conceded that the quantum of proof necessary to support an increase in motor carrier rates was different and heavier than that required in the years prior to 1963, but stated that this change had been set forth in its decisions in and after 1963 and in specific detail in an order entered on August 3, 1964. The motor carriers were directed to cancel the subject rate increase on or before March 10, 1967, but the order provided that its effectiveness would be stayed or postponed if a further complaint was filed in district court by one or more of the motor carriers prior to the March 10 compliance date.

The instant action was filed by the motor carriers on February 27, 1967, seeking to annul, set aside, and vacate the second ICC rate cancellation order. The three percent rate increase was superseded by a further increase which became effective on August 29, 1967. On September 4, 1968 the shippers were allowed to intervene in the instant action and counterclaim for restitutionary damages. Their appeal to the Supreme Court from the original three-judge decision was dismissed as moot. National Small Shipments Traffic Conference, Inc. v. Ringsby Truck Lines, Inc., 389 U.S. 576.

Because of the contingency provision of the second rate cancellation order, its effectiveness was stayed pending judicial disposition of the controversy. When no party pressed for trial the court, on its own motion, set the case to be heard on December 1, 1971. In a judgment entered March 2, 1972 the three-judge court vacated and set aside the second rate cancellation order and remanded the matter to the ICC for further appropriate proceedings. The issue of the shippers' restitutionary counterclaim was not addressed. Shippers again appealed to the Supreme Court and filed a protective appeal with this court. The ICC has taken no further action on the remand.

The ICC and the United States moved to dismiss the appeal in the Supreme Court for lack of jurisdiction. They contended that once the 1964 rate increase was superseded by the 1967 rates, the rate cancellation order lost all vitality except with respect to the possibility of restitution for charges collected in the interim. They thus argued that while the relief sought and granted was in form injunctive, it was in substantive effect only declaratory and retrospective. The motion to dismiss concluded that the three-judge procedures were not properly invoked, that the matter should have been referred to a single judge, and that the Supreme Court therefore lacked jurisdiction of the direct appeal.

Without articulating its reasons, the Supreme Court dismissed the appeal on October 24, 1972 for lack of jurisdiction, National Small Shipments Traffic Conference, Inc. v. Ringsby Truck Lines, Inc., 409 U.S. 943, and the shippers have now pressed their appeal before this court.

The motor carriers have challenged our jurisdiction to entertain this appeal. They argue that their complaint below sought injunctive relief against an ICC order under 28 U.S.C. § 1336, that under 28 U.S.C. § 2325 such

a complaint can be heard only by a district court composed of three judges, that the case below was properly decided by such a court, and that appeal therefrom lies only to the United States Supreme Court under 28 U.S.C. § 1253. They conclude that under 28 U.S.C. § 1291 courts of appeals are denied jurisdiction where direct review may be had in the United States Supreme Court.

We do not agree with this contention. The proper application of the rule of exclusive review upon which appellees rely necessarily depends upon whether the dispositive issue requires the consideration of a three-judge court, for the Supreme Court will not directly review a judgment of a three-judge court when such court was not required. Pennsylvania Public Utility Comm'n v. Pennsylvania R.R., 382 U.S. 281.

The appeal to the United States Supreme Court, brought by the shippers alone, was dismissed without opinion for lack of jurisdiction. In the absence of an articulated reason for this dismissal, we will not presume to engage in a meaningless exercise of reading that Court's mind. It is sufficient to note for our purposes that the appeal could have been dismissed because the Court felt that the three-judge court below was not required.

We are convinced that events occurring subsequent to the convening of the statutory three-judge court abrogated the necessity of such a court and that the dismissal of the shippers' appeal to the Supreme Court was justified on this ground alone. We are mindful of the fact that the complaint of the motor carriers as originally filed sought relief from the ICC rate cancellation order in a manner which was in form injunctive. At that time it properly would have been heard before a three-judge court pursuant to 28 U.S.C. §§ 1336, 2325, and 2284. This is so because the complaint was filed at a time in February 1967 when the ICC rate cancellation order

was directed at a current rate increase. When the case was finally heard before the three-judge court in 1971, however, that rate increase had been superseded by an August 1967 increase which had, in turn, been superseded by other increases. The necessity for a three-judge court to provide injunctive relief against the three percent rate cancellation order was therefore obviated and determination of the validity of the ICC order was of practical import only as it related to the restitutionary claim of the shippers for charges previously exacted. The ICC order thus became essentially one for the payment of money and was properly reviewable by a one-judge rather than a three-judge district court. Pennsylvania R.R. v. United States, 362 U.S. 202.

In Middlewest Motor Freight Bureau v. United States, 8 Cir., 433 F2 212, *cert. den.*, 402 U.S. 999, closely related factually to the case at bar, a three-judge court below dismissed an action brought by motor carriers for injunctive relief against an ICC rate cancellation order because superseding rate increases had mooted the issue of the cancellation order as between the ICC and the carriers.[1] In our opinion this procedure should have been followed in the case at bar.

The fact that a three-judge court was not required does not automatically render its judgment invalid. It merely constitutes a squandering of judicial energy and the proper procedure is simply to bring the appeal in the appropriate court of appeals. Moody v. Flowers, 387 U.S. 97.

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[1] In *Middlewest*, however, the three-judge court had entertained the shippers' counterclaim for restitution and had denied relief on equitable grounds. The appellate court held that while the three-judge court should not have considered the counterclaim because it was not within the statutory purpose of a three-judge court, the failure to dismiss the counterclaim did not invalidate the judgment. It merely rendered direct appeal to the Supreme Court inappropriate and the appeal properly lay before the appropriate court of appeals.

But the motor carriers maintain that there is a further impediment to our appellate jurisdiction in that the judgment below was not final. While it is true that the three-judge court vacated the ICC order and remanded the case "for such further proceedings as may be appropriate," our refusal to entertain this appeal on grounds of nonfinality would elevate form over substance. Although the court below did not address itself to the issue of the shippers' restitutionary counterclaim, it is clear that any right to restitution is dependent upon the validity of an ICC rate cancellation order which has twice been set aside by a three-judge district court. In fact both parties to this appeal agree that the judgment of the court below is final with respect to the validity of the ICC order. The ICC has taken no further action on the remand (an entirely understandable position in view of the fact that the rate increase which its order sought to cancel has been superseded). Any future action for relief brought by the shippers before a single judge would necessarily be subject to dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, the judgment of the three-judge court below is indisputably final.

The finality requirement of 28 U.S.C. § 1291 is meant to be given a practical rather than technical effect. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541. To deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review. We are aware that under normal circumstances a remand to an administrative agency for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291. Boston & Maine R.R. v. United States, 358 U.S. 68; Pauls v. Secretary of the Air Force, 1 Cir., 457 F2 294. But we are unable to apply this rule where, as here, to do so would violate basic judicial principles. "Where the effect of a district court's order, if not reviewed, is

the death knell of the action, review should be allowed." Eisen v. Carlisle and Jacquelin, 2 Cir., 370 F2 119, 121, *cert. den.*, 386 U.S. 1035. The appeal is properly before this court.

We now proceed to a consideration of the judgment which vacated and set aside the ICC rate cancellation order and remanded the matter to the Commission for further proceedings. For reasons already discussed, we believe that the three-judge court below was not required and that it should have been dissolved, thereby enabling the shippers to bring their claim for restitution before a single judge. While the judgment below is nevertheless operative, we feel that the very fact that the court below felt that three-judge consideration was required resulted in its disposition of the case in a manner which was not responsive to the real issue in question.

As previously indicated, the sole remaining justiciable controversy when this case was heard in 1971 was the shippers' counterclaim for restitution. What was really at stake was the legality of charges exacted under the three percent rate increase between the time when the first rate cancellation order was scheduled to become effective and the time when the superseding increase became operative.[2] It was during this time that, but for the direct and indirect[3] effect of judicial action, the

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[2] In Wisconsin v. Federal Power Commission, 373 U.S. 294, rates charged by the Phillips Petroleum Company had been investigated by the FPC. The Court pointedly addressed the significance of a superseded rate:

> An increased rate which is later superseded by a further increase is thus effective only for the limited intervening period, called the "locked-in" period, and retains significance in § 4(e) proceedings only in respect of its refundability if found unlawful. 373 U.S. at 298 n.5.

[3] The direct judicial effect was the temporary restraining order issued after the first ICC rate cancellation order. The indirect effect was the provision in the second ICC order which allowed

motor carriers would have been unable to charge the increased rate.

The court below, at the outset of its opinion, properly stated that the crucial issue in determining the validity of the rate cancellation order was whether the ICC had given fair notice of its departure from standards employed in previous years relating to the quantum of evidence which would justify a rate increase. This issue was never resolved, the court concluding that the question of fairness of notice was "a debatable one." The court instead based its judgment on factors which we today hold were nongermane. Construing its role as one of determining the propriety of injunctive relief against an ICC order, the court's primary concern was the length of time which these rates had been in effect.

> Now they have been in effect for 6½ years. The presently effective rates are substantially higher. Without going into the multitudinous technical arguments relating to the change in Commission standards and the adequacy of the notice of those changes, we are convinced that there was "a period of uncertainty and room for misunderstanding," Wyoming v. Colorado, 309 U.S. 572, 582, *which makes unfair the 1971 rejection of rates which have been effective since 1964.* (emphasis added.)

While it is true that the three percent increase has technically been in effect since 1964, in the sense that it has never been finally canceled, in practical import the "effect" of the increase ceased to operate in August 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first ICC rate cancellation order was scheduled to become operative and before the superseding increase. The cru-

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for a stay if further judicial action was initiated prior to the order's designated compliance date.

cial issue, therefore, was whether the rate was just and reasonable during that period and proper consideration of the rate cancellation order should have been limited to its validity at the time it was issued. The deliberation of the court below was not so limited and in view of this we cannot let stand a judgment with such preemptive collateral consequences. The shippers are entitled to their day in court.

It is apparent that the court below perceived its function as one of determining a controversy between the ICC and the motor carriers. We have concluded that this controversy was moot and that ripeness existed only in the shippers' restitutionary claim. This claim the court below refused to entertain, and in its capacity as a three-judge court we think that this procedure was proper. This action belongs before a single judge and it may now be so brought. We therefore consider it inappropriate to make an essentially *de novo* determination of the validity of the ICC order in question. Any consideration of other issues raised by both parties relating to the restitutionary claim would be similarly premature.

The judgment of the court below remanding the action to the Commission is vacated and the case is remanded to the district court (one judge) with instructions to entertain appellants' claim.

APPENDIX B

MEMORANDUM OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 67-C-97

RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, INC., NAVAJO FREIGHTLINES, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., DC INTERNATIONAL, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, GARRETT FREIGHTLINES, INC., IML FREIGHT, INC., LEE WAY MOTOR FREIGHT, INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E. FREIGHT, INC., TRANSCON LINES, UNITED-BUCKINGHAM FREIGHT LINES, WATSON-WILSON TRANSPORTATION SYSTEM, INC., and WESTERN GILLETTE, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervening Defendants.

MEMORANDUM OPINION AND ORDER

Per Curiam

This complicated rate case turns, in our opinion, on whether the Interstate Commerce Commission gave fair notice of its departure from standards employed in previ-

ous years and relating to the quantum of evidence which would justify a rate increase. The Commission held that it gave fair notice and denied the increase on the ground that it was not just and reasonable. The pending action was brought by 15 motor common carriers to annul and enjoin the Commission decision. The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference were permitted to intervene. A history of the Commission and court proceedings is needed for an understanding of the controversy.

By schedules which became effective on August 1, 1964, the parties to certain motor common carrier tariffs established a general 3 percent increase in their transcontinental rates and charges. On April 15, 1966, the Commission cancelled the increases. Increased Class & Commodity Rates, Transcontinental, 326 I.C.C. 397. On suit by the carriers we issued a temporary restraining order enjoining the Commission's cancellation of the increase. The same parties that have intervened in the instant case also intervened in that case. On January 5, 1967, after hearing, we vacated and set aside the Commission's order and remanded the matter to the Commission for clarification of its reasoning. Ringsby Truck Lines, Inc. v. United States, D.C. Colo., 263 F. Supp. 552. This was followed by (1) a prompt reopening of the case by the Commission which, on February 1, 1967, affirmed its prior decision, see Increased Class & Commodity Rates, Transcontinental, 329 I.C.C. 420, and (2) an appeal to the Supreme Court by the intervenors which, on January 15, 1968, was dismissed as moot, see National Small Shipments Traffic Conference Inc. v. Ringsby Truck Lines, Inc., 389 U.S. 576. The Commission order provided that the filing before March 10, 1967, of a complaint challenging it would stay its effectiveness. The instant action was filed on February 27, 1967, and the stay has remained in effect. Our order permitting intervention was entered on September 5, 1968.

No party pressed for trial of the case. The court, on its own motion, set the trial for December 10, 1971. Various files, records, and affidavits were received. It appears therefrom that during the period 1967-1971 the Commission permitted various general increases in transcontinental rates and charges for common carriers. Although we are unable to derive the overall percentage of the general increase, the carriers presented the affidavit of an expert which says:

> "Considering only general increase, Plaintiffs' present rates on transcontinental shipments weighing 0-499 pounds are 38.87% higher than the rates placed under investigation in Docket No. 34462 [with which we are concerned]. The rates on shipments weighing 500 pounds and over are from 11.41% to 26.14% higher than those placed under investigation in Docket No. 34462."

It appears that the now effective rates are substantially higher than those which the Commission disallowed in its 1966 order. The result is that we are concerned only with the increase which applied to rates charged and collected between August 1, 1964, and the date in 1967 when the permitted increase became effective.

The decision of the Commission after our remand in the first case concedes a change of standards. The Commission said, 329 I.C.C. at 426:

> "The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates."

Speaking generally, the carriers assert that the change is from judgment sampling to probability sampling. This may be an over-simplification but it points up the problem. As we understand judgment sampling, an expert presents a traffic study of representative carriers and

justifies a requested increase on that basis. In probability sampling, random selections are made of carriers and periods and the results of an analysis therefrom determine whether the rates are just and reasonable.

In its post-remand decision the Commission said that it had not changed from judgment sampling to probability sampling "but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative," and that the carriers failed to make such showing, 329 I.C.C. at 427. In holding that the carriers had fair notice of the change, the Commission relies primarily on its August 3, 1964, order which among other things required actual cost and revenue data, operating ratios, a showing of the representative nature of the carriers used, and carrier-affiliate information.

To support their 1964 request for rate increases the carriers presented judgment sampling. The Commission rejected the showing because of the lack of details required by the August 3, 1964, order. The parties argue at great length the fairness of the notice given by the August 3, 1964, order and earlier but less persuasive Commission actions.

In our opinion the question of the fairness of the notice is debatable. The evidence which the carriers produced to justify the requested increase is outlined in our first decision, 263 F. Supp. at 554, and need not be repeated. The Hearing Examiner recommended that the increase be granted. He specifically found that "the study carriers were representative of the entire class affected, that the studies were in all respects proper, and that the carriers had demonstrated their need for additional revenue." *Ibid.* We mention this only because it seems to us that if the notice was as clear as the Commission and the intervenors now asserts, the Hearing Examiner, presumably an expert

on the subject, would have recognized and applied the new standards.

Three Commissioners dissented from the February 1, 1967, Commission order after remand in the first case. Commissioner Goff, joined by Commissioner Walrath, said (329 I.C.C. at 427):

> "The increase has been in effect for 2½ years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel that we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale."

Commissioner Deason said (329 I.C.C. at 428):

> "The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2½ years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.
>
> As I see it, the Commission has an affirmative role, within the framework of the act and the national transportation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission."

We agree with the dissenting Commissioners. When they spoke, the rates had been in effect for 2½ years.

Now they have been in effect for 6½ years. The presently effective rates are substantially higher. Without going into the multitudinous technical arguments relating to the change in Commission standards and the adequacy of the notice of those changes, we are convinced that there was "a period of uncertainty and room for misunderstanding," Wyoming v. Colorado, 309 U.S. 572, 582, which makes unfair the 1971 rejection rates which have been effective since 1964.

It is accordingly ordered that the Commission's order of February 1, 1967, is vacated and set aside and the matter is remanded to the Commission for such further proceedings as may be appropriate.

Dated at Denver, Colorado, this 1st day of March, 1972.

By the Court:

/s/ Jean S. Breitenstein
United States District Judge

/s/ Alfred A. Arraj
United States District Judge

/s/ Hatfield Chilson
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 34462

INCREASED CLASS & COMMODITY RATES,
TRANSCONTINENTAL

Decided February 1, 1967

Upon reconsideration, findings in prior report, 326 I.C.C. 397, supplemented, clarified, and affirmed.

Appearances shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the instant proceeding approximately 1,400 motor common carrier respondents to tariffs published by the Rocky Mountain Motor Rate Bureau, Inc., filed a general 3-percent increase in their so-called transcontinental rates and charges, with certain exceptions not here material. Upon protest of numerous parties listed in the prior report, 326 I.C.C. 397, Division 2, Acting as an Appellate Division, by order of July 31, 1964, instituted an investigation into the lawfulness of such schedules without suspension of their effectiveness, and they became effective and have remained in effect since August 1, 1964. By order of August 3, 1964, discussed hereinafter, the division required the respondents to submit evidence.

Following the submission of further proof, and oral hearing for the purpose of cross-examination, the division by report and order of April 15, 1966, found the increase not shown to be just and reasonable and required the schedules to be canceled and the proceeding to be discontinued. The Division, Acting as an Appellate Division, subsequently denied the respondents' petition for reconsideration, and the schedules were ordered to be canceled as of September 12, 1966. A petition for a finding of general transportation importance was denied by order of the entire Commission on August 24, 1966.

The United States District Court for the District of Colorado in a case entitled *Ringsby Truck Lines, Inc.* v. *United States*, 263 F. Supp. 552, civil action No. 66-C-467, temporarily restrained the effectiveness of the division's order, and in an opinion of January 5, 1967, reversed and remanded the proceeding. The court, noting the apparent departures of the rationale of the division's report from other cases of the Commission, held it was unable to determine the real reasons for the division's decision, including whether the Commission actually changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. It, therefore, held that upon remand "the Commission should explain with some detail exactly how the carriers failed to prove their case and what standards are being applied." It added, that, "if the Commission concludes that the carriers did not disclose sufficient [sic] detailed data, it should explain what type of data it is requiring." The present report is being issued in response to the court's opinion.

At the outset we do not read the court's opinion as standing for the proposition that we may not depart from rationales of prior decisions, or that we may not change the quantum or nature of proof necessary to satisfy the statutory burden of proof upon reasonable notice. The present case, in the court's view, turns on the unclearness of the prior report over whether the division has applied a new standard of proof, particularly in light of the specific references to this proceeding in *Motor Carrier Probability Sampling Studies*, 329 I.C.C. 683. Much of the court's opinion deals with the question whether the quantum of proof adduced by the carriers was equal to the proof which the Commission has in the past held to be sufficient. The court addresses itself to this question because it does not find any clear indication in the prior report that any new quantum of proof was required by the order of August 3, 1964. The background of this five-page order,[1] issued by the division in numerous proceedings, requires explanation.

Prior to 1962, the Commission approved several general increases, often without detailed investigation. The general increases of the respondent motor carriers generally followed, and in certain ways supported, the increases required by the railroads to maintain their service. See *Transcontinental Motor Rates—Increases*, 49 M.C.C. 211, 213; *Transcontinental and Rocky Mountain Increases*, 54 M.C.C. 377, 378; *Transcontinental and Western Increases, 1952*, 61 M.C.C. 755, 756; *Increases, Transcontinental-Intermountain Coast*, 304 I.C.C. 15, 16-17. We explained the competitive situation of the modes of transportation in *Increased Freight Rates, E., W., and S., Territories, 1956*, 300 I.C.C. 633, 667-68, as follows:

> Whether the railroads will be able to maintain the increases here sought will depend largely upon

[1] A summary of its requirements was set forth in the prior report as part I of the appendix, 326 I.C.C. at 407-408.

> whether their principal competitors, the motor carriers, make similar increases in their freight rates and charges. The motor carriers are not parties to this proceeding, but obviously their entire rate structure and freight revenues will be indirectly affected by the decision in this case. * * *
>
> Railroad executives who testified that total freight revenues would be increased rather than reduced by the proposed increases based their opinion, in part, upon the fact that, in the past, motor-carrier rates have been quickly increased after a general freight rate increase by the railroads. In most cases if the motor carriers do not increase their rates, the railroads will not be able to maintain the increases. This fact is of particular significance when it is realized that the total revenues of the motor carriers subject to our jurisdiction are now more than half as much as those of the railroads subject to our jurisdiction.

The straitened condition of the Nation's railroads generally improved by the 1960's. While approving a general increase of the respondent motor carriers in 1963, we admonished that we were not satisfied with the quantum of evidence produced and stated:

> There is criticism that the respondents' evidence does not reveal in sufficient detail the extent to which their revenues and expenses are related to the transcontinental traffic on which the increases apply, and that some of the carriers providing data do not appear to move a substantial volume of such traffic. * * * In the future, studies should be made which reflect the revenues and expenses and their relationship to the specific traffic on which the increases are to apply.

General Increases—Transcontinental, 319 I.C.C. 792, 803. In an earlier proceeding, we stated that once we had typical cost and revenue evidence we would henceforth

require further evidence concerning the appropriate profit level. We specifically recognized that the particular operating ratio (93 percent) relied upon in the past was not an immutable standard and may well have become obsolete. *General Increases—Eastern Central Territory*, 316 I.C.C. 467, 481.[2]

In this context, division 2 (by Commissioner Freas) issued its order of August 3, 1964, in this proceeding. The order required "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved." The order required "detailed data to establish the representative nature of the carriers used," and "in addition all pertinent evidence and supporting data for the individual representative carriers * * * specifically relating to the traffic and territories involved," including ratios of income to investment. The order required carrier-affiliate information; and further required:

> That the traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the

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[2] The operating ratio, or ratio of expenses to revenues, of 93 percent was first adopted in the 1940's by this Commission. *Increased Common Carrier Truck Rates in the East*, 42 M.C.C. 633, 650; *Middle West General Increases*, 48 M.C.C. 541, 550. Operating ratios even then were not considered the sole standard of revenue need, 48 M.C.C. at 563; and since those years, as noted in the prior report (at 398), there have been "recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs." These general attacks recently culminated in the decision of the entire nine-member Court of Appeals for the District of Columbia Circuit that specific findings and evidence other than bare operating ratios are necessary as a matter of law before an increase in rates may be allowed. *D. C. Transit System, Inc.* v. *Washington Metropolitan Area Transit Commission*, 350 F.2d 753 (1965). See also *General Increase-Middle Atlantic & N. Eng. Ter.*, 319 I.C.C. 168, 176-77; *LTL COR Rates Between East and Territories West*, 326 I.C.C. 174, 202.

periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound.

We at once note that when the order called for "detailed data," and that "such cost and traffic studies shall be shown to be representative and their selection statistically sound," that the order gave clear notice we would not accept a bare opinion that a particular group of carriers or a study period was representative. The order gave clear notice that we required objective evidence and would carefully decide the reasonableness of the opinion evidence of experts and consider the "force of their reasoning." [3]

Of course, respondents had never presented a witness' "judgment sample" of representative carriers in any past increase proceeding; nor had we relied on such opinions, unsupported by other evidence, in a general increase case. We required some further showing. For example, in *General Increases—Eastern Central Territory*, 316 I.C.C. 467, the carriers used a judgment sample that was shown to embrace 80 percent of the same carriers' revenues in the considered territory, and the study was readily reconciled with their reported data (at 471). Other objective tests of the sample were made available to us. The percentage distribution of the traffic for single-line and interline traffic was similar as between the traffic study and those carriers' annual reports to the Commission (at 494). Moreover, it was considered persuasive that the cost study carriers' participation in the considered traffic was over 66 percent of their total traffic (at 493).

A judgment sample can be made subject to objective tests and data that would show whether it is representa-

[3] Under the ruling of *Market Street R. Co.* v. *Comm'n.*, 324 U.S. 548, 560-61 (1945).

tive. If carriers seeking increased rates are grouped by relative size, a judgment sample adequately reflects the entire group, if it is shown that all sizes are reasonably represented. If carriers are grouped by relative efficiency (*e.g.*, according to their operating ratios), a judgment sample of such carriers must likewise be shown to reflect the characteristics of the entire group. If the figures are weighted, the witness must show why it is reasonable to permit the larger carrier to determine the outcome in the circumstances of that case.

In *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174, 197, we described further tests of a judgment sample that are available to an expert witness. A random sample may be taken of the remaining carriers, and the witness may either show that the remaining carriers are not significantly different from the study carriers, or if the remainder differ, apply the proper weights from the probability sample to correct for the differences.

In *Motor Carrier Probability Sampling Studies, Forms 2, 4, 7 and 10, supra*, we adhered to a prior judgment selection of carriers to participate in certain special studies only upon finding that we were concerned with sampling only this particular universe, or group of carriers, *all* of whom were included. We specifically found, "Given this universe, no statistical bias will exist so long as no carriers are excluded" (page 15). The discussion concerned the proper definition of the total group of carriers under study (the universe), rather than the proper method for sampling the universe or for testing the sample. That report does not require random sampling in all cases and does not govern here.

The sample of carriers in the present proceeding do not meet the standards of proof set forth in the order of August 3, 1964. No objective tests of the sample were

made, and no objective data were presented on this record to support the sample. As the court notes, the evidence consisted entirely of the opinion of one witness and the statements of company officials. The expert explained his choice on cross-examination in terms of, (1) his sample carriers "perform the principal transcontinental transportation;" (2) "by working with a numerically small group of carriers it was possible" to reflect both originating and interline traffic; and (3) the group produces "a substantial picture of the transportation characteristics of the transcontinental traffic."

No data was introduced to support these opinions, nor any showing made that the choice of carriers was statistically sound. His reasoning was not persuasive. The last two reasons apply to any sample and do not support the particular sample carriers chosen here. The first reason is not borne out by the record; there is no showing (1) of what proportion of the total transcontinental motor carrier traffic, participated in by 1,400 carriers, is handled by the 18 study carriers, or (2) that the study carriers perform the "principal" transcontinental transportation. The participation in this traffic is shown for 12 carriers without any data or reasons why these figures on participation prove an adequate sample. The cost study does not take into account the relative participation in transcontinental traffic of six carriers.

Eight of the carriers chosen by respondents for study were also studied by our staff in Statement No. 7-60. The inclusion of these eight carriers in respondents' study is not persuasive, since the staff study is limited to long-haul traffic, whereas the traffic that will bear the increase is both long-haul and short-haul.

Even if we were to assume that the study carriers were representative, we must nevertheless conclude that respondents did not prove that the period studied was

typical and statistically sound, as required by the order of August 3, 1964. Respondents' witness chose the "earliest possible dates for which the carriers could organize themselves." When the witness further stated that a week was taken for truckload traffic "in the middle of June to avoid peaks in traffic," the same reason would seem to apply to less-than-truckload traffic, but only 1 day was used for the latter. No objective test of the typicality of those dates was made to show they were statistically sound.

A third ground for finding that respondents did not meet their statutory burden of proof is their failure, although given notice under the express terms of the August 3, 1964 order, that we required "evidence and supporting data" justifying the amount of profit they wished to earn over and above their operating costs. The order required operating ratio evidence, and "all pertinent evidence and supporting data" regarding the rate of return "specifically relating to the traffic and territories involved."

The respondents presented no evidence of the rates of return the study carriers, or any other carriers, had earned, or would earn (with or without the increase), on the traffic that would bear the increase in the territories involved. The rate of return evidence was shown for the overall operation of the study carriers. The evidence, therefore, does not show us what returns would be made by the carriers on the traffic that would bear the increase. Of course, even if the carriers had presented these figures, their evidence would still be deficient under the standards of proof laid down by the Court of Appeals in the *D. C. Transit System, Inc., supra*, whether the carriers relied upon operating ratio or rate of return as the ultimate test of a fair profit.

The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates. The August 3, 1964, order gave fair notice of this departure; and the witnesses that appeared for respondents were admittedly aware that the August order, consistent with earlier admonitions, laid new ground rules for this general increase proceeding. If respondents had required more time to prepare their case, an appropriate remedy was available to them.

The order of August 3, 1964 is not unique to this case, nor is our dissatisfaction with the presentation made by the respondent motor carriers. We have applied the standards of the August 3, 1964, order consistently in other cases since about 1963,[4] and we strongly believe that a need for additional revenue through increased rates of motor carriers requires no less a showing than we have prescribed.

Addressing ourselves to the specific questions raised by the court in its opinion, we find, (1) the Commission has not changed the standard in this case from judgment sampling to probability sampling, but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative, which respondents have failed to do; (2) the quantum of proof necessary to support an increase in motor carrier rates is different and heavier than in the years prior to 1963, as set forth in decisions in and after 1963, and in specific detail in the order of August 3, 1964, in the present proceeding; and (3) the respondents' increases are disapproved, not for failure to present a credible witness or merely for failure to comply with

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[4] *E.g., General Increases, Between East and Territories West,* 329 I.C.C. 626; *LTL COR Rates—Between East and Territories West,* 326 I.C.C. 174; *Increased Rates, Southwest, Colorado, Wyoming,* 326 I.C.C. 216.

a procedural order, but for failing to sustain their burden of proof with the type of evidence of which they were given notice. We have shown wherein the carriers failed to prove their case, and what standards apply, including the type of objective tests of a judgment sample that can be introduced to support such a sample.

We affirm the finding of the prior report that the 3-percent general increase is not shown to be just and reasonable.

COMMISSIONER GOFF, whom COMMISSIONER WALRATH joins, dissenting:

The increase has been in effect for 2½ years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale.

COMMISSIONER DEASON, dissenting:

The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2½ years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.

As I see it, the Commission has an affirmative role, within the framework of the act and the national trans-

portation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission.

It is ordered, That the above-entitled proceeding is hereby reopened for reconsideration on the record as made;

It is further ordered, That for the reasons set forth in the above report the respondents herein are hereby notified and required to cancel on or before March 10, 1967, the schedules described in the order entered on July 31, 1964, by Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

It is further ordered, That since the remand of the United States District Court for the District of Colorado occasions this report and order, the compliance date of March 10, 1967, shall be stayed and postponed, if the Office of the Secretary or the Office of the General Counsel is served with a further complaint by one or more respondents in that or another court before such date, which postponement shall continue pending such further review proceedings.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

JUN 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1751

RINGSBY TRUCK LINES, INC., *et al.*,

Petitioners,

—v.—

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Petitioners,

—v.—

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents oppose issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case on the ground the decision below is correct.

Questions Presented

Can a final judgment of a United States District Court foreclosing recovery on a restitutional counterclaim be immune from any appellate review whatsoever?

Supplement to Petitioners' Statement of the Case

In the first review of the assailed I.C.C. order the United States District Court for the District of Colorado entered a temporary restraining order September 9, 1966 postponing the I.C.C. rate cancellation order indefinitely. On September 19, 1966 the respondents, National Small Shipments Traffic Conference and Drug and Toilet Preparation Traffic Conference, filed their answer and their counterclaim in the District Court for damages resulting from the alleged improvidence of this restraining order. October 11, 1966 the District Court entered an order permitting respondents to intervene, and permitting the filing of their counterclaim.

In the second review of the assailed I.C.C. order by the District Court below respondents filed a motion to intervene February 6, 1968, which the District Court eventually granted September 4, 1968.

Reasons Why the Writ Should Not Issue

The Court of Appeals found that the "effect" of the 3% carrier increase under review "ceased to operate in August, 1967 when it was first superseded" by one of several subsequent increases (Appendix, page 10a). As a result of this, "the necessity for a three-judge court to provide injunctive relief against the 3% rate cancellation order was therefore obviated and determination of the validity of the I.C.C. order was of practical import only as it related to the restitutionary claim of the shippers for charges previously exacted" (Appendix, page 7a).

At page 9 of their petition for certiorari the carriers admit that "the increase to which the Commission's order was addressed had been superseded by further increases * * *." At page 14 they carry this admission to its mandatory conclusion: "It is true, as the Court said, that the 'necessity for injunctive relief against [enforcement of the] order was obviated' by supervening events."

The Court of Appeals found:

> "The sole remaining justiciable controversy when this case was heard in 1971 was the shippers' counterclaim for restitution. What was really at stake was the legality of charges exacted under the three percent rate increase between the time when the first rate cancellation order was scheduled to become effective and the time when the superseding increase became operative. [footnote omitted] It was during this time that, but for the direct and indirect effect of judicial action, the motor carriers would have been unable to charge the increased rate. The indirect effect was the provision in the second I.C.C. order which allowed for a stay if further judicial action was initiated prior to the Order's designated compliance date" (Appendix, pages 9a-10a).
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>
> "* * * In practical import the 'effect' of the increase ceased to operate in August, 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first I.C.C. rate cancellation order was scheduled to become operative and before the superseding increase. The crucial issue, therefore, was whether the rate was just

and reasonable during that period * * *" (Appendix, pages 10a-11a).

Petitioners do not disagree with this and at page 13 of the petition say, "the dispositive issue, indeed the only issue, was the validity *vel non* of the finding by the Commission that an increase in rates had not been shown to be just and reasonable * * *."

The Court of Appeals found that "the court below refused to entertain the shippers' restitutionary claim * * *" (Appendix, page 11). Petitioners agree that "shippers' complaint for restitution * * * was not entertained by the District Court" (Petition, page 10).

The Court of Appeals found that the shippers should have been enabled "to bring their claim for restitution before a single judge" (Appendix, page 9a). "This action belongs before a single judge * * *" (Appendix, page 11a). Again, petitioners agree, saying at page 10 of the petition:

> "Shippers' complaint for restitution is of course a separate and distinct 'case or controversy' between them and the carriers. [footnote omitted] That 'case or controversy' is not one for a three-judge court, *Public Service Commission* v. *Brashear Freight Lines,* 312 U.S. 621 (1941), and was not entertained by the District Court."

Entry of the judgment below by the District Court vacating the order of the I.C.C. had, however, practical consequences according to the Court of Appeals:

> "Any further action for relief brought by the shippers before a single judge would necessarily be subject to

dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, judgment of the three-judge court below is indisputably final. * * * To deny jurisdiction here would effectively signal the end of Appellants' cause of action without any judicial review" (Appendix, page 8a).

Petitioners do not concede this point made by the Court of Appeals; *however, they do not contest it!* Their silence in this regard is the most eloquent aspect of their petition. They appear to urge that a judgment should stand which bars a shipper counterclaim, even though that counterclaim was never entertained by the trial court, and even though that judgment is addressed to a controversy become moot (the future validity of a superseded I.C.C. rate cancellation order). Finally, they urge that this extraordinary result lies within the appellate jurisdiction of no court in the United States to review.

The important juncture where the petition for the writ takes issue with the reasoning of the Court of Appeals begins with the finding of the Court of Appeals that:

"In *Middlewest Motor Freight Bureau* v. *United States*, 8 Cir., 433 F.2d 212, *cert. den.*, 402 U. S. 999, closely related factually to the case at bar, a three-judge court below dismissed an action brought by motor carriers for injunctive relief against an I.C.C. rate cancellation order because superseding rate increases had mooted the issue of the cancellation order as between the I.C.C. and the carriers. [footnote omitted] In our opinion this procedure should have been followed in the case at bar". (Appendix, page 7a).

Petitioners suggest, "there was no need to determine, and the District Court did not determine whether the order requiring the increase to be cancelled was valid or invalid" (Petition, page 9). Nonetheless they insist, "there was a necessity for the Court to determine whether or not, in the words of 28 U.S.C. §2321, to 'annul or set aside in whole or in part [an] order of the Interstate Commerce Commission other than for the payment of money . . .'" (Petition, page 14). Only in a footnote at pages 9-10 of the petition do petitioners disclose their reason for this conclusion:

> "In these circumstances, the vacation of the Commission's order by the District Court was the appropriate disposition of the case. *United States* v. *Munsingwear*, 340 U.S. 36 (1950). As this court said in *Mechling*, that disposition assures that the parties are not 'concluded in subsequent litigation' by an order of the Commission that has not been finally determined to be valid or invalid. 368 U.S. at 329. Shippers are free to attack, and carriers free to defend, the lawfulness of the charges paid in a proceeding before the Commission ancillary to a suit for reparations authorized by §204a of the Interstate Commerce Act, 49 U.S.C. 304a."

Thus the carriers appear to say that the order of the Interstate Commerce Commission should have been vacated so that the carriers would not be "concluded in subsequent litigation" from freedom to "attack" or "defend" the lawfulness of the freight charge payments for which the shippers have counterclaimed, and this "freedom" from being "concluded," say the carriers, is mandated by *Mechling*

Barge Lines, Inc. v. *United States,* 368 U.S. 324 (1961) and *United States* v. *Munsingwear,* 340 U.S. 36 (1950).

Before testing the support which *Mechling* and *Munsingwear* supply for this argument, its most important aspect is its complete departure from the reasoning of the District Court below in support of whose judgment the argument is advanced. The Court of Appeals explained:

> "• • • the crucial issue in determining the validity of the rate cancellation order was whether the I.C.C. had given fair notice of its departure from standards employed in previous years relating to the quantum of evidence which would justify a rate increase. *This issue was never resolved* the court concluding that the question of fairness of notice was a 'debatable one.' The court instead based its judgment on *factors which we today hold were nongermane.* Construing its role as one of determining the propriety of injunctive relief against an I.C.C. order, the court's primary concern was the length of time which these rates had been in effect.
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> While it is true that the three percent increase has technically been in effect since 1964, in the sense that it has never been finally canceled, in practical import the 'effect' of the increase ceased to operate in August 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first I.C.C. rate cancellation order was scheduled to become operative and before the superseding increase. The crucial issue, therefore, was whether the rate was just and reasonable during that period and

> proper consideration of the rate cancellation order should have been limited to its validity at the time it was issued. *The deliberation of the court below was not so limited* and in view of this we cannot let stand a judgment with such preemptive collateral consequences. The shippers are entitled to their day in court." (Appendix, pp. 10a-11a, emphasis supplied.)

Thus the carriers do not today before this Court suggest that the District Court below was correct in ruling that the passage of time extinguished the shipper counterclaim and hence called for vacation of the Commission order upon which that counterclaim rests. Instead the carriers resort to *Mechling* and *Munsingwear*.

Mechling Barge Line v. *United States*, 368 U.S. 324 (1961) dealt with the requirement in Section 4 of the Interstate Commerce Act that carrier freight charges for the longer distance may not exceed freight charges for a shorter distance in the same traffic lane without prior Commission permission (the Long and Short Haul Clause). I.C.C. practice was to grant such Fourth Section permissions without hearing by an order containing no findings as to how the tariff in question met statutory standards for Fourth Section relief. January 9, 1959, the Commission granted such a Fourth Section permission to some railroads by Fourth Section Order No. 19059, declined to suspend the tariff involved, but began an investigation as to whether the subject rates were just and reasonable. Thus the rates became effective during the period of investigation. Ten months later a barge line competitor of the railroads petitioned a Federal District Court for an injunction setting I.C.C. Fourth Section Order 19059 aside on the ground that it

issued without hearing, unaccompanied by necessary findings. This complaint also sought a declaratory judgment against the Commission prohibiting issuance of future such Fourth Section orders.

Thereafter, revised rates eliminated the long-and-short-haul clause violation and the railroads withdrew their application for Fourth Section Order No. 19059, and moved the Federal District Court to dismiss the barge line complaint on the grounds that: (1) the assailed Fourth Section Order had become moot, and (2) the District Court lacked jurisdiction to grant the declaratory relief sought. The barge line, which had a cause of action against the railroads for damages resulting from lost business due to unlawfully competitive railroad rates, objected, saying that the railroads could use Fourth Section Order 19059 to defend against this barge line damage claim in future litigation, unless Order 19059 was declared invalid responsive to the barge line complaint. The District Court granted the railroad motion to dismiss and this Court affirmed in principle, but modified the District Court judgment by ordering Commission Order No. 19059 vacated in reliance on *United States* v. *Munsingwear,* 340 U.S. 36 (1950), which ruled that when mootness precludes appellate review, the trial court judgment under review should be vacated to avoid any risk that a plea of *res judicata* will be based on that judgment in subsequent, collateral litigation.

Thus in *Mechling* this Court said the principle of *Munsingwear* should be extended to District Court review of administrative orders, *mutatis mutandis*. "The District Court should have vacated the [I.C.C.] order which it de-

clined to review." (368 U.S. at 329).[1] This Court explicitly noted that vacating I.C.C. Fourth Section Order 19059 in no way foreclosed the issue of its validity in any damage litigation brought by the barge line *in the future* before *another tribunal.* The distinctions between *Mechling* and the case at bar are:

(1) In *Mechling* the barge line damage suit was prospective and speculative; in the case at bar the shipper counterclaim is present, pleaded, and matured.

(2) In *Mechling* the risk was of a finding of *res judicata* by another tribunal bound by the ruling of the court below; in the case at bar, the same tribunal (the District Court) decides both the shipper counterclaim and the issue of validity of the I.C.C. order under review.

(3) In *Mechling* there was no jurisdiction to review an inoperative agency order, because the reviewing court (the District Court) could grant no relief respecting it, just as in *Munsingwear* the Appellate Court could grant no relief respecting the district court judgment which had become moot; in the case at bar, the District Court below has jurisdiction to award damages on the basis of the operative, albeit dated, effect of the tariff under review. In other words, *Mechling* rests on *Munsingwear* and *Munsingwear* applies only where the reviewing tribunal can neither award nor withhold relief on the basis of the order under review. Here, neither *Munsingwear* nor *Mechling* apply because the reviewing tribunal, i.e.,

[1] As to declaratory relief, this Court ruled that sound exercise of discretion in *Mechling* called for withholding it for reasons irrelevant to the matter at hand.

> the District Court below, *can* award or withhold the damages sought by the shipper counterclaim, depending on the validity of the Commission 3% cancellation order under review.

This carrier error stems from a confusion of the remedy of reparations with that of restitution. The former is statutory under §204a of the Interstate Commerce Act, 49 U.S.C. §304a, cited in the footnote at page 10 of the petition herein. The latter is equitable and is designed to right the wrong of unjust enrichment. The difference between these two remedies in a transportation context has been established elaborately in *Middlewest Motor Freight Bureau* v. *United States,* 433 F.2d 212 (8 Cir., 1970).

The shipper respondents herein have no remedy of reparations. Section 204a(2) of the Interstate Commerce Act, 49 U.S.C. §304a(2), establishes two years as the period of limitations for such actions. Any right of action for reparations accrued to respondents in 1966 and has long since expired. Petitioners' suggestion is specious that they are in any jeopardy of *res judicata* in further litigation should their complaint herein be dismissed which seeks vacation of the Commission's rate cancellation order.

Petitioners say that "jurisdiction of a Federal court is determined by the situation existing at the time the suit is begun" (Petition, page 10). They imply that subsequent supersession of the assailed rate increase cannot alter jurisdictional parameters. At page 7 of the petition they make a closely related argument when, in their footnote, they say, "no party challenged the jurisdiction of the three-judge court while the case was before it."

Both arguments ignore the concession they make at page 10 that the "shippers' complaint for restitution is of course a separate and distinct 'case or controversy' between them and the carriers," and the further concession that this shipper complaint "was not entertained by the district court." Until the district court addressed itself to the shipper counterclaim there was no occasion to challenge its jurisdiction to act in the configuration of three judges. Nor do respondent shippers make any argument that rate supersession subsequent to commencement of the suit divested the three-judge court of any jurisdiction it possessed. The shipper counterclaim lies within the jurisdiction only of a single-judge district court and the carrier petitioners do not argue otherwise. Rate supersession has not ousted the three-judge district court below of jurisdiction to entertain the carrier complaint—it has only made appropriate the response to that complaint of a judgment of dismissal. Thus, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 282 (1938); *Smith* v. *Sperling*, 354 U.S. 91 (1951); *Brough* v. *Strathmann Supply Co. Inc.*, 358 F.2d 374 (3 Cir. 1966); and *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825 (N.D., Tex., 1938), *aff'd per curiam*, 308 U.S. 512, cited at page 11 of the petition, have no bearing on this appeal.

CONCLUSION

The trial court vacated as invalid a Commission rate order for the wrong reasons, petitioners do not deny that the trial court's reasoning erred, and seek to support the trial court's judgment on a basis which the Court of Appeals says that the trial court has never adequately

entertained or evaluated. Respondents' counterclaim, which petitioners concede has never been entertained or evaluated by the trial court, depends critically on the validity of this Commission rate order and hence will be foreclosed by any judgment of the trial court which vacates that Commission rate order as invalid. This court has disclaimed direct appellate jurisdiction to review the judgment below. Petitioners seek a like such disclaimer from the Court of Appeals. The Court of Appeals must have appellate jurisdiction. Otherwise, denial of respondents' counterclaim would be immune to any appellate review whatsoever, a result repugnant to the purpose and uncalled for by any sensible construction of the Interstate Commerce Act or of the Judicial Code. Consequently, the petition for the writ lacks any merit, supplies no basis for belief that plenary analysis of the case on appeal would warrant reversal, and should be denied.

Respectfully submitted,

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June 21, 1974

Certificate of Service

I, WILLIAM Q. KEENAN, counsel for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of June, 1974, I mailed copies of the foregoing document, first class postage prepaid to the following:

Honorable William B. Saxbe, Attorney General, Department of Justice, Washington, D. C. 20530, Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable James L. Treece, United States Attorney, 323 United States Court House, Denver, Colorado 80202.

Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

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IN THE

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OCTOBER TERM, 1973

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RINGSBY TRUCK LINES, INC., ET AL.,
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v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND THE DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Respondents.

PETITIONERS' REPLY BRIEF

The question presented is whether or not Court of Appeals has jurisdiction of an appeal from a judgment of a three-judge District Court in a suit by motor carriers to set aside an order of the Interstate Commerce Commission finding increased rates not shown to be just and reasonable. The Court of Appeals held that it had such jurisdiction because occurrences after the entry of the order made it "essentially one for the payment of money and [therefore] properly reviewable by a one-judge rather than a three-judge district court." (App. to Pet., p. 7a). The "special and important" reason for the issuance of the writ is that the decision is squarely in conflict with the decision of the three-judge District

Court in *Admiral Merchants Motor Freight, Inc.* v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971) and this Court's affirmance of that decision at 404 U.S. 802 (1971). Respondents, unable to deny or explain away the conflict, choose to ignore it. They do not even cite *Admiral Merchants*, much less discuss it or attempt to distinguish it.

Respondents' basic premise is that the District Court's judgment must be reviewable someplace. Since this Court declined to review it, the only place left is the Court of Appeals. The premise is false. *U. S.* v. *Munsingwear*, 340 U.S. 36 (1950), and cases there cited make clear that supervening events may render a judgment of a District Court unreviewable. So too, supervening events may render an order of the Commission unreviewable. *Mechling Barge Lines, Inc.* v. *U. S.*, 368 U.S. 324 (1961). *Mechling* held that when the validity *vel non* of an order need not be determined because the plaintiff no longer needs relief from it, the proper disposition of the case by the three-judge court is to vacate the order so that no party will be concluded by it. That is the situation here and what the District Court did here. Since the increase to which the Commission's order was addressed had been superseded by further increases, the carriers no longer needed relief from it. Hence, there was no need to determine, and the Court did not determine, the validity of the order. Rather, it simply set it aside.

Respondents seek to distinguish *Mechling* in three ways. Dealing with the first two, the rule of *Mechling* is that when judicial review of the Commission's resolution of issues is foreclosed because its order incorporating that resolution is moot, the order is to be vacated so that it will not conclude any party in other litigation. The reason for the rule—to prevent a plea of *res judicata* grounded on an unreviewed order—compels its application whether the other litigation has been commenced in the same court by way of a counterclaim, as here, or

not yet been commenced in any court, as there. Indeed, the fact that the other litigation is pending makes a stronger case than if it were merely what Respondents call "prospective or speculative."

As for the third distinction, it simply does not exist. Respondents point out that in neither *Mechling* nor *Munsingwear* could the reviewing courts grant the relief sought in the cases before them because the orders from which relief was sought had become inoperative. That is equally true here. The rate increase which the order of the Commission from which the carriers' sought relief required to be cancelled had been superseded by further increases at the time the District Court rendered its judgment. Hence, the order was inoperative.

Respondents say that, unless the Court of Appeals has jurisdiction to review the judgment of the three-judge Court here, the denial of their counterclaim for restitution is immune from appellate review. This is simply not so. Contrary to Respondents' claim (Br., p. 8), the District Court did not hold "that the passage of time extinguished the shipper counterclaim." There has been no denial of the counterclaim. As Respondents themselves point out, their counterclaim (a) was not entertained by the three-judge District Court, (b) is a claim for a single-judge court and (c) is still pending.

Respondents argue that their counterclaim "depends critically on the validity of the Commission rate order and hence will be foreclosed by any judgment of the trial court which vacates the rate order as invalid." (Br., p. 13). We agree. But the judgment of the three-judge court did not vacate the Commission's order as invalid. On the contrary, the Court specifically refrained from determining the validity of the order. Hence its judgment does not foreclose the counterclaim. The counterclaim has yet to be heard and judgment thereon yet to

be entered. Be that judgment for or against Respondents, it will be reviewable by the Court of Appeals.[1]

We submit that our Petition sets forth a special and important reason for the issuance of a writ of certiorari, namely, a conflict between the decision of the Court of Appeals and the decisions of this Court in *Admiral Merchants*, *Mechling* and *Munsingwear*. Respondents have not shown that the conflict does not exist. Indeed, they make no attempt whatever to deny or explain away the

[1] This makes clear the distinction between this case and *Middlewest Motor Freight Bureau* v. *U. S.*, 433 F. 2d 212 (8th Cir. 1970), cert. den. 402 U.S. 999 (1970). There the carriers dismissed their suit challenging the Commission's order finding increased rates unreasonable, thus rendering that order final and valid. The District Court then entertained and rendered judgment on the shippers' counterclaim for restitution. Jurisdiction to review that judgment was of course in the Court of Appeals.

conflict with *Admiral Merchants*. We therefore urge that a writ issue.

Respectfully submitted,

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September 25, 1974

CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., one of counsel for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 26th day of September, 1974, I mailed copies of the foregoing document, first class postage prepaid, to the following:

Honorable William B. Saxbe, Attorney General, Department of Justice, Washington, D. C. 20530, Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable James L. Treece, United States Attorney, 323 United States Court House, Denver, Colorado 80202.

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